

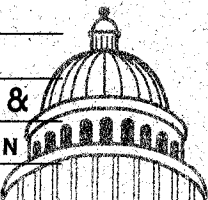
OLSON

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FAIR POLITICAL
PRACTICES COMMISSION

02 JAN 14 AM 10:32

January 14, 2002

VIA HAND DELIVERY

Karen Getman, Chairman
Fair Political Practices Commission
428 J Street
Sacramento, Ca. 95814

Re: Advertising Disclosure – Proposed Emergency Regulations

Dear Chairman Getman:

LANCE H. OLSON
BRUCE J. HAGEL
GEORGE WATERS
DIANE M. FISHBURN
ELIZABETH L. GADE
N. EUGENE HILL
DEBORAH B. CAPLAN
SARAH E. GILMER
JAMES A. KEALEY
THOMAS E. GAUTHIER

As you know, I am a partner with the law firm of Olson, Hagel, Waters & Fishburn. I am writing on behalf of myself and Chip Nielsen and Steve Lucas, partners with the law firm of Nielsen, Merksamer, Parrinello, Mueller & Naylor. Each of our offices has been involved in the representation of a significant number of statewide ballot measure committees. With respect to the upcoming March, 2002 election, our law firms represent four separate committees primarily formed to support the passage of several initiatives: Propositions 40 (Park Bonds--Olson, Hagel), 41 (Voting Equipment Bonds--Nielsen, Merksamer), 42 (Transportation Sales Tax--Nielsen, Merksamer) and 45 (Term Limits--Olson, Hagel).

Of Counsel
LEROY Y. FONG

The renewed applicability of several Proposition 208 advertising disclosure provisions will directly affect these committees, as statewide ballot measures are typically funded by large donations and involve fairly extensive media campaigns. We write to urge the Commission to adopt emergency regulations interpreting the advertising disclaimer provisions of Government Code §§ 84501 through 84509. Attached to this letter are proposed regulations we urge the Commission to adopt. Our proposals are based directly on the noticed regulations presented by staff, with noted changes.

The staff memorandum dated December 26, 2002 correctly states that there is an urgent need to have emergency regulations in place as soon as possible in order to provide guidance to these committees in connection with the upcoming March elections. Since these statutory provisions are likely to be triggered by most, if not all, the public communications and since the penalties for violation are substantial (up to three times the cost of the

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advertisement), it is important to have a clear and immediate guidance as to what the law requires in each instance. We appreciate the opportunities previously provided by your office to identify our concerns, and at this time we would like to formally address the proposed regulations, following the format of the staff's memorandum.

Decision 1: Committee Name (Limitation to "Primarily Formed" Committees)

The proposed amendments to Regulation 18402 and 18450.3 would limit the scope of Gov. Code § 84504 to primarily formed ballot measure committees rather than any committee that participates in a ballot measure campaign. We strongly support this interpretation and believe that the failure to limit the scope of that section would create enormous problems for the reasons presented at the earlier Commission meeting and described in the staff memorandum.

Decision 2: Committee Name (Use of the Word "Identification")

Staff has bracketed the word "identification" in Regulation 18402(c)(2) and (c)(3), recommending that it be deleted. We agree that it should be deleted. We believe that the requirement of Gov. Code § 84504 that the committee "name and identify" itself is simply a way of saying that its name must include certain information and, whenever the name is subsequently required, must identify itself with the same name. Since Regulation 18402 only addresses name issues, it does not appear to be necessary to deal with the identification issue, which is addressed primarily in the amendments to Regulation 18450.3. In addition, inclusion of the word "identification" would be confusing and possibly misleading, as use of both "name" and "identification" suggests the possibility that there may be two distinct terms.

Decision 3: Committee Name (Incorporation of 84504(c) and (d))

Staff has recommended incorporation of these provisions into Regulation 18402 for purposes of completeness and ease of reference. We have no opposition to this proposal.

Decision 4: Committee Name Identification (Advertisement Disclosure)

Gov. Code § 84504 requires every committee described in that section to "name and identify itself using *a name or phrase that clearly identifies the economic or special interest of its major donors* of fifty thousand (\$50,000) or more..." (Emphasis added.) Proposed Regulation 18450.3 defines this provision.

The staff memorandum correctly states that we have advocated an approach to this regulation that would allow the committee to identify the "shared interest(s)" of the major donors. We have come to this conclusion for a number of reasons:

1) The statute clearly refers to "a name or phrase." Each term is singular. The term "economic or special interest" is similarly singular even though it refers to the ballot measure's major *donors*, which is plural. If the economic or special interest of each donor were required to be described separately, these terms should have been plural. In our experience, statewide initiatives are likely to have an increasing number of donors over the \$50,000 threshold; if the interest of each must be described separately, it would not only be inconsistent with the language of the statute, but would create extremely lengthy and cumbersome names.

There appears to have been an assumption in the statute that the major donors would share an "economic or special interest." While this may be true in a very narrow range of initiatives, it will more often be true that the only real "shared" interest may be their interest in the subject matter of the initiative. While in some cases this shared interest may be economic, in many others it may have no economic basis (e.g., after-school programs, term limits, election day voter registration). While Option B allows for multiple interests to be identified, it also allows them to be combined when the donors believe that their "interest" is a shared one.

2) Neither "economic interest" nor "special interest" are statutorily defined. Does "economic interest" refer to one's current source of income? The source of one's wealth? Does it require identification of all economic interests for persons having more than one business interest? What is (or is not) a "special interest"? If the goal is really to identify the "motivation" of the parties funding a particular initiative, attempts to determine and define that "motivation" are likely to be fraught with problems. Assessing liability based on an allegation that a person's "special interest" has not been accurately identified and described may well be unlawful and unenforceable. Since the statute has no definition for that term, who can say whether a particular name or phrase accurately describes a donor's interest? Put another way, if the Commission attempts to impose some objective criteria on language that is inherently subjective, won't every committee name be the potential subject of litigation?

3) To interpret this language to allow donors some latitude in describing their shared interests does not deprive the requirement of content. While it may not require a litany of the business interests of each donor, it will at least require a "clear" identification of the donors' interests in the initiative. It will prohibit misleading names, or names that

suggest a position on the initiative that is in fact inconsistent with the donors' interests with respect to the initiative. (For example, a committee supporting utility deregulation could not describe its donors' interests in a way that suggested that they favored regulation. Or, if the language requiring that their interest be related to the initiative is included, a committee could not claim a shared interest that was wholly unrelated to the subject matter of the initiative (e.g., a committee supporting utility deregulation could not identify its interest as supporting law enforcement).)

4) To the extent that the statute seeks to require disclosure of specific, objective donor information, much of that information is available through other requirements, i.e., the sponsorship requirements, the required disclosure of the two top donors, and the campaign disclosure reports themselves. While it might be tempting to try to reduce the "motivation" of a measure's major donors to "a name or phrase" for political reasons, the Commission should avoid trying to impose such a requirement as a matter of law. The extremely vague language of section 84504 simply cannot be stretched to require every donor to fit his or her interest into one of several pre-selected categories.

Decision 5: Contents of Disclosures

Proposed regulation 18450.4 concerns the nature of the required disclosure of the top two donors. Staff is correct that we do not see any particular language required in connection with this disclosure. It is hard to see how simply providing the names, without additional comment, results in the "avoidance" of disclosure of those entities as major funding sources. In particular, there is no requirement in the statute that the specific amount of the contribution be disclosed, and the possibility that amounts might change creates certain logistical problems.

Having said that, we understand that the Commission may wish to adopt a regulation that requires the committee to put the major donor information into context for the public. If that is the case, we support Option 1, which permits some flexibility to the committee in designing its disclosure. Staff has provided two examples: "major funding by" and "major support provided by." We would encourage adding "paid for by" to give committees the option of conforming their disclosure to meet the Federal Communications Commission (FCC) disclaimer rules that currently apply to television [and radio] broadcasts. Since these regulations will be adopted on an emergency basis, this issue can be revisited if experience with the March campaigns suggest the need for further Commission action.

With respect to the size of the disclosure, we do have some concerns about the current proposal. The statute requires that the disclosure statement be printed "clearly and

legibly in no less than 10 point type and in a conspicuous manner as defined by the Commission..." For television spots, the proposed regulation requires that the statement "shall be printed *in letters equal to or larger than* four percent of the vertical picture height." While we are not opposed to a requirement that *the statement itself* occupy four percent of the vertical picture height, requiring each letter to equal four percent will create significant problems for committees with particularly long names. Many committees, particularly sponsored committees, will be faced with disclosures that take up an inordinate amount of the picture height. We propose that the statement itself be at least four percent of the picture height, or alternatively, that it be of sufficient size to be legible to an average viewer.¹ We also note that the FCC regulations currently permit the disclosure to be at either the beginning or the end of the advertisement, and we have added language that would make that possible for these disclosures as well.

The regulations also require that, for print media, the height of the statement "shall constitute at least five percent (5%) of the height of the printed space..." The statute already requires 10 point type. We believe that any disclosure in the average "mail piece" (i.e., letters, brochures, handouts, etc.) that is in 10 point type in a contrasting color is, by definition, clear and legible within the meaning of the statute, and that there is no need for a percentage requirement for most print media. Having to calculate percentages "of the height of printed space," particularly on brochures and similar print pieces that may contain pictures or graphics, seems to us to be a cumbersome and somewhat onerous burden to impose on committees. While a requirement of 10 point type is easily conveyed and easily verified, attempting to do the same thing with percentage calculations is likely to result in inadvertent violations and disputes over what constitutes "printed space" on a given mailer.

If the Commission is concerned with "oversize" communications such as billboards, we suggest that these communications be addressed in a separate regulation. We have proposed language that would retain the 10 point type requirement for printed communications designed to be distributed in person or by mail, and a separate regulation

¹ We are aware that the current FCC regulations require each letter in candidate disclosures to be no less than four percent of the picture height. However, those regulations do not apply to disclosures for ballot measure advertisements. We note that the FCC originally only required all disclosures to be "of sufficient size to be readily legible to an average viewer" since there were many factors to be considered in quantifying that requirement, including the length of the name, relationship of time shown to the size of letters, and difficulty in comprehending the words. They subsequently imposed a size requirement, but for candidate statements only. The candidate disclosures are, of course, much shorter than the average ballot measure disclosures. The latter may require anywhere from three to five lines to disclose all the necessary information. If the four percent rule we are proposing proves inadequate, the Commission can revisit the issue when it has more time to consider some of the problems that attend this issue.

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that uses a percentage approach for larger communications.

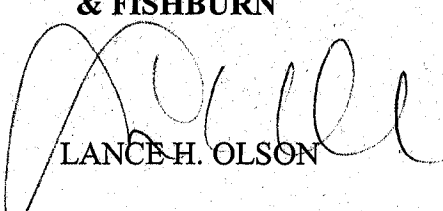
Decision 6: Amending Advertising Disclosure

The proposed regulation would require amendment of broadcast disclosures within seven days. We have consulted with media experts, and they have indicated that this time frame is too short to allow an advertisement to be "re-cut" with the new disclosure, redistributed to the media outlets, and worked into the time slots. We have therefore proposed seven working days. We have also deleted the suggestion that billboards be amended within seven days for obvious reasons.

Thank you for your consideration of our views on these matters.

Sincerely,

**OLSON, HAGEL, WATERS
& FISHBURN**



LANCE H. OLSON

cc: Commissioner Scott
Commissioner Swanson
Commissioner Knox
Commissioner Downey
Luisa Menchaca, Esq.
Scott Tocher, Esq.
Chip Nielsen, Esq.
Steve Lucas, Esq.

Amend 2 Cal. Code Regs. Section 18402:

18402. Committee Names.

- (a) A committee shall use only one name on its statement of organization.
- (b) The Secretary of State shall not issue an identification number to any committee with the same name as any existing committee that already has an identification number. The name of one committee will be considered the same as that of another committee if the same words are used in the same order, excluding articles.
- (c) Whenever identification of a committee is required by law, the identification shall include the full name of the committee as contained in the statement of organization.
 - (1) In the case of a sponsored committee, the statement of organization shall include the name of the committee as provided in 2 Cal. Code Regs. section 18419.
 - (2) For purposes of Government Code section 84504, in the case of a committee primarily formed to support or oppose a ballot measure, the committee name shall clearly identify the economic or other special interest of the committee's major donors of \$50,000 or more.
 - (3) If candidates or their controlled committees, as a group or individually are major contributors of \$50,000 or more, the committee name shall include the controlling candidate's name.
 - (4) If major donors of \$50,000 or more share a common employer, the identity of the employer shall also be disclosed.

Add 2 Cal. Code Regs. Section 18450.3 to read:

18450.3. Committee Name Identification. Advertisement Disclosure.

(a) The name identification requirements of Government Code section 84504 shall apply only to committees that are primarily formed to support or oppose a ballot measure, as defined by Government Code section 82047.5.

(b) For purposes of implementing the name identification requirements of Government Code section 84504, the following shall apply to any committee primarily formed to support or oppose a ballot measure as defined by Government Code section 82047.5.

(1) Identification of a disclosable contributor's "economic or other special interest" pursuant to Government Code section 84504 shall identify the economic interest, or other goal or purpose of the contributor that is specifically concerned with the ballot measure in question.

(2) The name of a committee that has more than one disclosable contributor may identify any economic interest or other goal or purpose that is specifically concerned with the ballot measure in question that is shared by more than one disclosable contributor. In the event there is more than one disclosable contributor and all such disclosable contributors do not share an economic interest or other goal or purpose, the name shall identify the various economic interests or other goals or purposes.

(c) If, pursuant to Government Code section 84504, major donors of \$50,000 or more share a common employer, the identity of the employer shall also be disclosed.

(d) If, pursuant to Government Code section 84504, candidates or their controlled

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committees, as a group or individually, are major contributors of \$50,000 or more, the committee name identification shall include the controlling candidates' names.

(e) In addition to the requirements of Government Code section 84504, for purposes of implementing the name identification requirements of Government Code 84506, if an acronym is used to specify any committee names, the full names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements.

Note: Authority cited: Section 83112, Government Code.
Reference: Sections 84504 and 84506, Government Code

Add 2 Cal. Code Regs. Section 18450.4:

18450.4. Contents of Disclosure Statements. Advertisement Disclosure.

Where a "disclosure statement" or "disclosure" is required for an advertisement under Government Code sections 84503, 84504, 84506 and 84507, the following shall apply to the committee that authorized and paid for the advertisement:

(a) Disclosures required under Government Code sections 84503 and 84506 shall include the name of the contributor or contributors pursuant to regulation 18450.3.

[The disclosure shall explicitly indicate that the contributor or contributors were major donors to the committee by stating, for example, "major funding by", "major support provided by", or "paid for by".]

(b) The disclosures required by Government Code sections 84503, 84504, 84506, 84507, and 84511 shall be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of the person or committee that paid for the communication as specified below.

(1) Television: The information shall be both written and spoken at either the beginning or the end of the communication, except that if the disclosure statement is written for at least five seconds of a thirty second or less broadcast or ten seconds of a sixty second broadcast, a spoken disclosure statement is not required. The written disclosure statement shall be [equal to or larger than four percent of the vertical picture height] [of sufficient size to be readily legible to an average viewer] and air for not less than four seconds.

(2) Radio: The information shall be spoken at the beginning or end of the communication and shall last at least three seconds.

(3) Print Media: All disclosure statements on printed materials designed to be distributed personally or through the mail shall be printed in type no less than 10 points in size and shall be printed in a contrasting color to the background on which it appears.

(4) If a single print media advertisement consists of multiple pages, folds, or faces, the disclosure requirement of this section applies only to one page, fold, or face.

(5) Oversize Print Media: All disclosure statements on printed materials that are larger than those designed to be individually distributed (e.g., billboards) shall constitute at least five percent (5%) of the height of the advertisement and printed in a contrasting color.

(6) Each communication that would require a disclosure if distributed separately. that is included in a package of materials must contain the required disclosure.

NOTE: Authority cited: Section 83112. Government Code.

Reference: Sections 84503, 84504, 84506, 84507 and 84511. Government Code.

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Add 2 Cal. Code Regs. Section 18450.5:

18450.5. Amended Advertising Disclosure and Statements of Organization.

(a) Advertising Amendments: Advertisement disclosures must be amended when a new person qualifies as a disclosable contributor under Government Code sections 84503 or 84506, or when the committee's name changes pursuant to Government Code 84504 and 2 Cal. Code Regs. Section 18402 or section 18450.3.

(b) Timing of advertisement Amendments:

(1) Broadcast advertisement disclosures must be amended within 7 working days after a new person qualifies as a disclosable contributor or a committee's name changes. A committee shall be deemed to have complied with this section if the amended advertisement is mailed to all affected broadcast stations by overnight mail no later than close of business on the seventh working day.

(2) Print media advertisement disclosures must be amended to reflect accurate disclosure information every time an order to re-produce the advertisement is placed.

(3) Tangible item disclosure statements must be amended to reflect accurate disclosure information every time an order to reproduce the item is placed.

NOTE: Authority cited: Section 83112, Government Code.

Reference: Sections 84503, 84504, 84506 and 84507, Government Code.